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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,
Petitioner,

v.

SULLIVAN DRYDOCK & REPAIR CORPORATION, ROY GRANATA, etc.,
Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

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PRELIMINARY STATEMENT

This brief is filed on behalf of The American Legion as Amicus Curiae, pursuant to the written consent of the parties to this action as required by Section 9 of Rule 27 of this court.

The American Legion is a non-political, civilian organization originally chartered by Act of Congress September 16, 1919 (U. S. C. A. Tit. 36, Sec. 41-51, incl.), which was amended October 29, 1942 (U. S. C. A. Tit. 36, Secs. 43 and 45). The Federal Act outlines its purposes[1] and, among other things, fixes eligibility for membership,[2] which is composed of veterans of World War I and World War II who have served in the naval or military services of the United States between certain dates, or who, being citizens of the United States at the time of enlistment, served in the naval or military services of any of the governments associated with the United States during either of said wars, provided, however, that such person shall have an honorable discharge or separation from such service or continue to serve honorably after the date of cessation of hostilities as fixed by the United States Government.

The Legion is composed of fifty-eight (58) departments, forty-nine (49) of which are located within the continental limits of the United States. These departments, in turn, are

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1. *Purposes of Corporation*—The purpose of this corporation shall be: To uphold and defend the Constitution of the United States of America; to promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the two World Wars fought to uphold democracy; to cement the ties and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country. (As amended Oct. 29, 1942, c. 633, Sec. 1, 56 Stat. 1012, U. S. C. A. Title 36, Sec. 43.)

2. *Persons Eligible to Membership*—No person shall be a member of this corporation unless he served in the naval or military services of the United States at some time during the period between April 6, 1917, and November 11, 1918, or during the period between December 7, 1941, and the date of cessation of hostilities as fixed by the United States Government, all dates inclusive, or who, being citizens of the United States at the time of enlistment, served in the military or naval services of any of the governments associated with the United States during either of said World Wars; *Provided, however,* That such person shall have an honorabe discharge or separation from such service or continue to serve honorably after the date of cessation of such hostilities as determined herein. (As amended Oct. 29, 1942, c. 633, Sec. 2, 56 Stat. 1042, U. S. C. A. Title 36, Sec. 45.)

organized into post or chapter organizations, and at the present time there are over fourteen thousand (14,000) such posts throughout the United States with a total membership of 2,800,000 engaged in the rehabilitation of the returning veteran and committed to service to the community, state, and nation.

Our organization is not dominated by either capital or labor, but it is amply represented in every community by a cross-section of both groups. Its membership is not restricted as to race, color, or creed, but is determined only by whether the applicant for membership has had honorable service in either or both of the two World Wars fought for democracy.

Since the inception of the late war, The American Legion has sponsored much legislation designed for the care of widows and orphans of those veterans who lost their lives in the service of their country, and for the purpose of rehabilitating the returning veteran so that he may take his proper place in the community upon his return to civilian life and become a useful citizen. Included in this legislation was the Service Men's Readjustment Act (Pub. Law 346, 78th Cong., 58 Stat. 293), commonly known as the G. I. Bill of Rights. This legislation makes it possible for the returning veteran to complete his education and to obtain loans for home and farm purchases and business ventures. It further provides unemployment benefits. Under Title IV, Section 600(a), a Veterans' Placement Service Board was created consisting of The Administrator of Veterans' Affairs, the Director of the National Selective Service System, and the Administrator of the Federal Security Agency or the agency performing such functions, and under Section 601(e), the Board is authorized, among other things, "to

assist in every possible way in improving working conditions and the advancement of employment of veterans." Consequently, The American Legion is deeply interested in the enforcement of Section 8 of the Selective Training and Service Act of 1940, as Amended, which provides re-employment rights to the veteran upon the completion of his period of service, the construction of which is presented for review in the instant case. We believe that it was the intent of Congress that a liberal construction be given to this legislation in order that immediate rehabilitation be afforded in the field of employment, so that the veteran might receive the benefit of compensation for labor performed, and so that he might re-acquire the skill which was lost by reason of his period of service in the armed forces.

LEGION'S POSITION

In view of the fact that the rehabilitation of the veteran is of prime concern to the community, state, and nation, The American Legion is interested in the accomplishment of this objective at the earliest possible moment. The veteran has done a magnificent job in the performance of the obligations which were cast upon him under the terms of the Selective Training and Service Act and by his efforts has preserved the security of the nation. In return for such service we believe that he is entitled to a liberal construction of Section 8 of said act guaranteeing to him certain re-employment benefits which we contend were extended as an aid to his rehabilitation upon return to civilian life. A narrow construction of this legislation would defeat the intent of the statute. We know of no problem that is greater or more important to the continued well-being of

the community, state, and nation than the re-employment of the veteran who is not in a position to continue his educational activities or engage in business ventures, even though it may mean the displacement of a non-veteran for the limited period of one year, as this right, if accorded, will be of distinct value in his rehabilitation in the community in which he resides. It will not be our purpose in this brief to attempt to place the veteran upon a pedestal, but we do not want to see him penalized and placed at a permanent disadvantage by reason of his service to his country in time of need. We contend that the rights accorded under Section 8 of the Selective Training and Service Act, under discussion, contemplated continuous employment for a period of one year upon the veteran's return, unless the employer's status has so changed as to make this impossible or unreasonable. The act surely did not contemplate that the veteran should be denied work if it was available because other non-veterans had a greater seniority status. If such an interpretation were indulged, the right would be illusory, and the purpose of the legislation would be defeated. Rehabilitation and the re-aquisition of skill cannot be accomplished if the veteran is placed on the payroll but not given work to do.

The Opinions Below, the Jurisdiction of this Court, the Statement of the Case and its Disposition will have undoubtedly been set forth in the briefs of the parties to this Cause, and we shall avoid repeating them herein. We shall also leave the recital of the evidence and other portions of the record to the parties in this cause and shall devote this brief to the discussion of the foregoing problems. Suffice it to say, however, that the Plaintiff in the Trial Court, Abraham Fishgold, as shown by the record below, returned from

the military service and was restored to his former employment. He was subsequently denied employment for a definite period, preference being given to a non-veteran under a collective bargaining agreement which the Union and the employer had entered into after the adoption of the Act and in his absence. He sued for the wages to which he would have been entitled had he worked during this period, and the lower court gave him judgment, which was reversed in a majority opinion March 4, 1946, by U. S. Second Circuit Court of Appeals, Justice Chase dissenting. The case presents the rights of the veteran under sections 8 (b), and 8 (c) of the Selective Training and Service Act, as Amended, and we shall proceed to the discussion of such rights. We have, however, set out in Appendix A the pertinent portions of the Selective Training and Service Act, as Amended, the construction of which are involved in this Appeal.

SUMMARY OF ARGUMENT

POINT I. Under Sections 8 (b) and (c) of the Act, the Veteran is entitled to be restored to his former position and afforded actual employment for one year thereafter without regard to the seniority if the work he previously performed is still available.

1. Legislative intent supports this view.

2. The Act should be liberally construed to carry out the Congressional intent.

POINT II. The rights accorded in Sections 8 (b) and (c) of the Act are independent rights and cannot be impaired by collective bargaining agreements.

1. Seniority rights of non-veterans under collective bargaining agreements, pursuant to the Wagner Act, are suspended as they conflict with the rights accorded the veteran under Sections 8 (b) and (c) of the Selective Training and Service Act.

POINT III. Refusal, by reason of seniority rules contained in a collective bargaining agreement, to give the veteran work for one year after his return violates Section 8 (c) of the Act.

1. "Super-seniority" is a misnomer as applied to veteran's rights.

POINT IV. Rules of the Selective Service Administrator construing the veteran's right should be followed.

1. The majority opinion in the court below is inconsistent with the uniform application of the Act.

POINT V. Relative Equities involved.

ARGUMENT

I.

Under Sections 8 (b) and (c) of the Act, the Veteran Is Entitled to Be Restored to His Former Position and Afforded Actual Employment for One Year Thereafter Without Regard to Seniority If the Work He Previously Performed Is Still Available.

Section 8 (a) of the Act provides:

> "Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *"

The requirements enumerated in Section 8 (a) and those enumerated in Section 8 (b) of the Act were met by the plaintiff in the instant case, thus entitling him to restoration to his employment under Section 8 (b) of said Act, which reads as follows:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such

certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

The veteran is to be restored without loss of seniority and shall not be discharged from such position without cause within one year after restoration, as provided in Sec. (c), in the following language:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the em-

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* At time plaintiff applied for re-employment, this read forty days.

> ployer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *"

When these sections are read together, it will be noted that they confer independent benefits on the returning veteran which he would not have otherwise enjoyed upon the termination of his service. Subsection (b) of Section 8 extends the right to re-employment to a veteran who "has left or leaves a position, other than a temporary position, in the employ or any employer."

In the original drafts of the Act, the term "job" was used instead of the word "position" which appeared in the final draft of this legislation. We submit that the latter term was more inclusive than the former and would cover not only employment involving manual labor, but professional services which also require skill, ability, and training. This viewpoint finds support in the case of *Kay v. General Cable Corporation,* Misc. No. 778 A. U. S. District Court, New Jersey, Jan. 8, 1946, in which a physician was asserting his right under this section to reinstatement as medical director of the defendant corporation, in which the court held:

> "Where the wage increase of a particular position results neither from an overall company wage policy, nor from automatic in-grade increases, the veteran is not automatically entitled to an increased wage for the sole reason that another who presently holds the same or a like position as that formerly held by the veteran is presently receiving a higher wage. In such case it can in no way be said that the veteran has been denied any seniority rights.

"This is the more true where the position in question is of a professional or special nature requiring individual skill, ability and training such as is the position here involved. In such a case the wage is determined by individual ability rather than on a wage scale on the job itself."

Section 8 (c) of the Act provides that the veteran shall be restored without loss of seniority and shall not be discharged from such position without cause within one year after such restoration. It is inconceivable that the legislative intent was to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if such was available. Such an interpretation would nullify the meaning of these two guarantees and would defeat the purpose of rehabilitation of the veteran who has performed his part of the obligation required by the entire Act.

The term "seniority" as used in Section 8, Paragraph (B) of said Act merely prescribes a method of determining the alternative job to which the veteran was to be restored if his old position was not available and had no reference to his seniority status. It did not relate to "some relative 'position' in a figurative line of men available for work." (Judge Chase, dissenting opinion in Circuit Court of Appeals.) It means the restoration to a job comparable to the one he left and not inclusion on a seniority roster.

1. Legislative Intent Supports This View.

In September, 1940, the major portion of Europe was at war, feeling was tense, and preparations were being made for the security of our country in the event it was drawn into the conflict. Congress was faced with this situa-

tion at the time of the enactment of the Selective Training and Service Act of 1940, which included Section 8.

A review of the legislative history of this section discloses that its primary purpose was to provide the veteran, upon his return from military service, actual employment for a period of one year on the job which he was forced to leave, regardless of his seniority rights, if the work he formerly performed was still being done.

The original bill, later to be known as the Selective Training and Service Act, provided no re-employment rights upon termination of military service, but this provision was first incorporated in committee. The original draft of the bill by the Senate Military Affairs Committee included the statement that "the purpose and intent of Congress that every man who is called from a job * * * ought to be re-employed in such job or an equally good one without loss of seniority. * * *" (Committee Print No. I, July 23, 1940.) In the fourth draft in committee a provision was included directing re-employment to be "without loss of seniority or benefits or insurance participation or benefits." Also the rights on restoration were incorporated in a paragraph separate from that providing re-employment, and provision against discharge without cause for a period of one year was included. The committee report clearly expressed the intent and purpose of Congress to be "that every man who leaves his job to participate in this training and service should be re-employed, without loss of seniority or other benefits, upon his return to civilian life." (Senate Report 2002, 76th Congress, 3rd Session, P. 8.)

Reference was made to Section 8 by Senator Thomas, member of the Senate Military Affairs Committee, as "the

attempt of the committee to make secure persons' jobs after the year's service." (86 Cong. Rec. 10572.) Representative Celler, in referring to the Companion House Bill, stated, "All those who serve shall have the right to claim return to their jobs." (86 Cong. Rec. 11435.) Many like expressions by those considering the bill indicated that actual employment was contemplated. (See 86 Cong. Rec. 10107-10487-11697.) After the bill had reached the Senate Committee, the House Military Affairs Committee in affording additional protection inserted the word "seniority" before the phrase "status and pay" as applied to a like position in the event the veteran could not be restored to the one he left.

Representative May in commenting on this insertion stated:

> "You will find in that amendment Nos. 12, 13, and 14, the House inserted the word 'seniority' relating to a position held by the guardsmen. It is inserted in three places and provides that he shall be restored to his seniority status. In other words, if a man who is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left, without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position." (86 Cong. Rec. 10761.)

An amendment was also added to subsection (c) protecting seniority rights so that it read as follows:

> "Any person who is restored to a position in accordance with the provisions of Paragraphs (A)

or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces*, shall be so restored without loss of seniority, *shall be entitled to participate* in insurance or other benefits offered by *the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration." (Italicized portions indicate added language.)

Representative May, on behalf of the House Committee on military affairs, explained the amendment as follows:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service, and they will even be permitted to count this time on the question of their retirement." (86 Cong. Rec. 11702.)

Senator Sheppard, speaking in favor of the amendment in the Senate, stated:

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me a good suggestion." (86 Cong. Rec. 10914.)

During the consideration of the "work or fight" (H. R. 1752) legislation considered by Congress in 1945, the in-

clusion of re-employment provisions was considered. Under Section 6 (a) of this proposed legislation, as adopted by the Senate March 8, 1945, the civilian employee was extended re-employment rights similar but not identical with those afforded the veteran, in that the period for application for reinstatement was reduced to thirty (30) days and a proviso was added at the conclusion of the subsection as follows:

> "*Provided*, That this section shall not be construed to confer greater employment rights than the individual would have had if he had remained employed in such position during the period of the employment or employments accepted by him upon the request of the Chairman of the War Manpower Commission."

Senator Thomas, Chairman of the Senate Military Affairs Committee, made the following comment in explanation of this subsection to the Senate:

> "In order to implement and supplement the recruitment efforts of our public employment offices, the bill includes, in section 4 (c), provisions for furnishing transportation, in cases where that is necessary to relieve manpower shortages which substantially impede the war effort, and includes, in section 6 (a), provisions for protecting the re-employment rights of workers who leave their jobs to become employed in work essential to the war effort in response to requests, or requirements made under the bill. The re-employment rights so provided are substantially those provided for veterans in section 8 of the Selective Training and Service Act, with two exceptions: First, the period within which application for re-employment in the former position must be filed is 30 days in lieu of the 90-day period

> provided for veterans; and, second, civilians accorded re-employment rights under this bill are not to secure greater employment rights than they would have had if they had remained in their original positions for the period during which they are employed in jobs accepted by them under the bill. The War Manpower Commission will issue certificates to persons entitled to re-employment rights under this section for the purpose of establishing the facts upon which the right to re-employment is dependent." (91 Cong. Rec. 1451.)

Senator Burton, now Mr. Justice Burton, also a member of the Senate Military Affairs Committee, made the following statement in explaining the effect of the foregoing proviso (91 Cong. Rec. 1583):

> "The tenth point relates to re-employment. This provision is roughly similar in its intent, but not entirely identical with the provision for men who are drafted into the military service, and who will come back and seek their original employment after having been taken from it. * * * There is a proviso which puts him back in precisely the same position in which he was when he left. He does not get an added guaranty of a year's employment upon his return."

These comments clearly indicate that Congress intended that the veteran have a guaranty of employment for one year after his return from service. We believe they completely answer the contention of those who assert that the word "position" is to be restricted to the rights provided by the collective bargaining agreement between the employees and the employer to which the veteran was not a party.

Presumably, Congress provided the benefit of re-employment for the period of one year due to the fact that the original act required training and service on the part of the veteran for a like period. We believe it is significant, that, under the bills now pending both in the Senate and the House providing for the extension of the Selective Training and Service Act, provision has also been made that even when the Act expires the protective portions of Section 8, will continue in force indefinitely.

2. The Act Should Be Liberally Construed to Carry Out the Congressional Intent.

In considering the intent of Congress, the entire purpose of the Act must be kept in mind. It provided for an adequate armed force in accordance with a fair and just system of compulsory military training and service in return for which those who served were given the right to re-employment under Section 8. This being true, the rights accorded under said section should be liberally construed to the end that the purpose to be accomplished may be attained. This viewpoint was clearly expressed in *Kay v. General Cable Corporation*, 144 Fed. (2d) 653, in the following language:

> "The policy of the Act is stated in Sec. 1 (b) to be that 'the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system . . .' though such declaration was hardly needed. Every consideration of fairness and justice makes it imperative that the Statute should be construed as liberally as possible so that military service should entail no greater setback in the private pursuit or

career of the returning soldier than is unavoidable. The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered in the light of the purpose which Congress intended to accomplish."

The foregoing language was also approved in the case of *Grasso v. Crowhurst* (No. 8966 U. S. 3rd Circuit Court of Appeals, Feb. 26, 1946).

The late case of *Whirls v. The Trailmobile Company* (No. 10189 U. S. 6th Circuit Court of Appeals, Apr. 5, 1946) expresses a liberal construction in the following language:

"There can be no reasonable doubt that in the mind and heart of the Congress the provisions of Section 308 (c) of the Act were designed and felt to be benevolent and avuncular to the young men compulsorily chosen for military training and service in time of national need. The Act expressly declared that it was imperative to increase and train the personnel of the armed forces of the United States; and that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selection.

"The Act was passed by Congress and approved by the President with full knowledge of the existence of the National Labor Relations Act. That Act was not amended; but surely it should not be presumed that Congress, in failing to amend the Wagner Act, intended to permit the concerted action of a collective bargaining agency and an employer to destroy or whittle down the statutory right of the returning soldier, sailor, airman and marine to restoration to seniority security in his job granted by the Selective Training and Service Act."

That the Act should be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation" is also supported in the cases of *Boone v. Lightner*, 319 U. S. 561, 575 and *Hall v. Union Light, Heat and Power Company*, 53 Fed. Supp. 817 (E. D. Ky.).

Statutes should be construed so that significance and effect shall be given, if possible, to every word. (*Market Company v. Hoffman*, 101 U. S. 112, 115). If the restricted interpretation advanced by the defendant union were adopted, this would not be accomplished.

That the statute was adopted "to protect the economic position of persons released from service" was again expressed in the case of *U. S. of America ex rel Stanley vs. Wimbish*, U. S. Circuit Court of Appeals, 4th Circuit, No. 5441, Apr. 10, 1946.

The obligation under Section 8 of the Act was a solemn pact by the people of this nation, acting through Congress, evidencing a sound policy which involved the welfare of fifteen million veterans. Such obligation superseded any right established under collective bargaining agreements made either before or after the veteran entered the military service. Now that he has performed his obligation of service, the greatest liberality should be indulged in the interpretation of this section in order that the reciprocal obligation of the public, as expressed by Congress, may also be fulfilled. It must be remembered that the veterans who are now returning have had many months of war service and it is imperative that rehabilitation be immediate and effective.

II.

The Rights Accorded in Sections 8 (b) and (c) of The Act Are Independent Rights and Cannot Be Impaired by Collective Bargaining Agreements.

The right conferred by Section 8 (b) of the statute restoring the veteran to his former position and the further right not to be discharged from said position without cause within one year after restoration, conferred under Sec. 8 (c), are separate, distinct, and independent rights, and should not be interpreted as limiting to one year the restoration of the veteran to his former position without loss of seniority.

In commenting on these independent rights, the court in the case of *Whirls v. The Trailmobile Company, supra*, stated:

> "The right of the veteran to be restored to his former position without loss of seniority is an independent and additional right, not to be impaired by the other protective benefits accorded him by the statute. His right to participation in insurance or other benefits offered by the employer, pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time the veteran was ordered into military service, is a separate and additional benefit. Likewise, the last provision in paragraph (c), that the veteran 'shall not be discharged from such position without cause within one year after such restoration,' is a separate, distinct and independent benefit and should not be construed as limiting to one year the restoration of the veteran to his former position without loss of seniority. While he may not be discharged without cause within one year, if he is not so discharged he retains his seniority status as long as the Selective

Training and Service Act in its present phraseology remains in effect. Collective bargaining agreements entered into pursuant to the terms of the Wagner Act must recognize the statutory right of the veteran to the seniority granted him by the selective service statute; and any such agreement which deprives him of that right is invalid to that extent."

1. Seniority Rights of Non-Veterans Under Collective Bargaining Agreements, Pursuant to the Wagner Act, Are Suspended as They Conflict with the Rights Accorded the Veteran Under Sections 8 (b) and (c) of the Selective Training and Service Act.

The rights of the veteran Fishgold, under Sections 8 (b) and (c) of the Act, are absolute and independent in character and guarantee one year's employment on the job which the veteran left if it is available upon his return. Seniority rights of non-veterans under collective bargaining agreements made pursuant to the National Labor Relations Act (29 U. S. C. A., Art. 151 et seq., 1940), commonly called the Wagner Act, are suspended by Section 16 (a) of the Selective Training and Service Act, as they conflict with the rights of the veteran. This section provides:

> "Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force."

We know of no reason why the word "suspended" was used in this section, unless it was intended to have application to rights created under collective bargaining agree-

ments which might impair or conflict with the independent rights accorded the veteran under Sections 8 (b) and (c) of the Act.

This section was adopted to prevent situations from arising which might give a non-veteran preference by reason of collective bargaining agreements.

In the case of *Whirls v. The Trailmobile Company, supra,* the court recognized the veteran's superior rights in the following language:

> "Reading together Section 308 (b) B and Section 308 (c) the mandate of the statute is plain that the veteran shall be restored by his private employer to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; and the person so restored to such position shall be considered as having been on furlough or leave of absence during his period of military service and shall be so restored without loss of seniority. As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces."

It cannot be denied that the seniority right of the non-veteran who displaced Fishgold, granted under a collective bargaining agreement executed pursuant to authority of the National Labor Relations Act, conflicted with the right given to Fishgold under Sections 8 (b) and (c) of the Selective Training and Service Act. Consequently such

non-veteran's right necessarily would be suspended for the protection of the returning veteran.

III.

Refusal, by Reason of Seniority Rules Contained in a Collective Bargaining Agreement, to Give the Veteran Work for One Year After His Return Violates Section 8 (c) of the Act.

In the instant case the veteran was refused available work by reason of the collective bargaining agreement which granted seniority to a non-veteran. This was a violation of the veteran's rights to protection in his existing seniority position under the Act and resulted in a virtual discharge for such period. If labor groups can make contracts with employers, which disregard this right, the power to defeat such right is by virtue of a contractual obligation, and the fact that such power was exercised only for a relatively short period of time is of no consequence. The recognition of such power would extend authority to exercise it for the entire period of one year, thus defeating the veteran's right to work. We can see no plausible connection between a "lay-off" occasioned by lack of work to do and an interruption of the veteran's employment because of contractual relations in which he had no voice. It would be unreasonable for the veteran to demand work in the former instance and unfair for the employer by contract to prevent the veteran from the enjoyment of his right in the latter instance. The employer has no control if no work is available, yet the employer and union do have control when work is to be done but the right to perform it is denied the veteran because of seniority rules established by a

collective bargaining agreement. In such instance it would be a discharge against which the veteran is protected.

> To "ignore the plainly expressed intention of the Congress that the veteran should be restored to his position without loss of seniority would be to adopt as unreasonable and unwarranted construction that the clause of the statute protecting the veteran against discharge without cause within one year after his return to his position nullifies the statutory guarantee of the preservation of his seniority status contained in a preceding clause."
>
> (*Whirls v. The Trailmobile Company, supra.*)

1. "Super-Seniority" Is a Misnomer as Applied to Veteran's Rights.

The term "super-seniority" has been applied in many instances to describe the right accorded the veteran under this legislation; that such an interpretation is erroneous, is apparent upon analysis of the nature of the right and the purpose to be accomplished. Seniority as used in labor relations refers to a permanent status by reason of continued service and acquired skill in a certain employment. It is established by contract. The act in question provides employment rights to the veteran extending for a period of one year by reason of military service for the purpose of rehabilitation. Consequently there is no relationship between the two rights. The veteran's right is better described as a service adjustment benefit.

The court in *Whirls v. The Trailmobile Company, supra,* commented upon this right as follows:

> "The right to collective bargaining and all the privileges conferred by the Wagner Act upon non-

combatant workers may be well preserved by just recognition in their collective bargaining agreements of the fair intendment of the Selective Training and Service Act that those who went to war must be protected in their then-existing seniority positions as long as the Act remains in effect. If this principle is accepted, there need be no industrial strife between those who worked and fought and those who worked but did not fight—which counsel for the Union and for the Company so gloomily predict. In our view, the language of the pertinent section of the Selective Training and Service Act, in its context, impels acceptance of this principle."

IV.

Rules of the Selective Service Administrator Construing the Veteran's Right Should Be Followed.

Under Section 10 (a) of the Act in question, the President is authorized:

> "(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;
>
> "(2) To create and establish a Selective Service System * * *." (See Appendix A.)

Executive Order 8545 dated September 2, 1940, (5 Fed. Reg. 3997) was issued by the President promulgating rules and regulations which created and established the Selective Service System and provided for its organization and administration as follows:

> "The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the Selective Service Law and is hereby authorized and directed:

"(a) To prescribe such amendments to these regulations as he shall deem necessary:

"(b) To issue such public notices, orders and instructions as shall be necessary to the efficient administration of the Selective Service Law. * * *"

Pursuant to this authority, the Director of Selective Service on May 20, 1944, issued Local Board Memorandum No. 190-A as follows:

> "A returning veteran is entitled to reinstatement in his former position or one of like seniority, status, and pay, even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority * * *.
>
> "A veteran, who has been reinstated to his former position, cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his re-employment rights under the Act, and would be, in effect, a repeal of an Act of Congress."

Various public debates took place prior to the adoption of this Memorandum, and after its issuance it was called to the public's attention by discussions and panels over the radio and in press comments. At a special Sub-Committee hearing of the Committee on Military Affairs of the House of Representatives, held September 12, 1944, the following discussion took place between Mr. Costello of the Committee and Colonel Keesling, representing the Selective Service System:

> "Mr. Costello: In reference to the question of seniority rights of veterans who have been in the service for some time, when they come back to be re-

employed, are they being given seniority as though they had been retained in the employment of private companies, where nonveterans are employed?

"Colonel Keesling: That is a matter, as you know, which has been a subject of considerable comment in the press and elsewhere.

"I would like to go into a little detail on that and try to clarify our position. There is no need to have any battle between individuals on a controversy where principle is involved, or where there is a matter of the construction of language.

"As we read Section 8, we have construed it to mean that the veteran is entitled to restoration in his job, regardless of his seniority or the seniority of any other individuals, if he meets the various conditions precedent set forth in Section 8, namely, if he applies within 40 days after discharge; if he is qualified to perform the job; if he has a certificate from the War Department; and if it is not unreasonable or impossible for the employer to employ him.

"Under those facts, we have held that even though a worker had been in a particular plant for 5 years, whereas the man beside him had been in the plant for only 3 years, and the man who had been in the plant 3 years went to war and came back and there was only one job left, the man who went to war would be re-employed even if it necessitated the release of the man with 2 years' seniority over the veteran. That is our position which raised the controversy.

"We took that construction, and, in line with our policy of fighting principles rather than personalitices, there is no reason for us to fight with individuals about it. We think our construction is right.

"The Act provides that there can be a determination by the Court somewhere along the line, and if

> the Court decides we are wrong, we will, of course, abide by the Court's decision. If Congress decides that our interpretation is erroneous, or that the Court's decision is wrong, Congress can clarify the situation by an amendment."

It will be noted that in this discussion this committee was directly advised that in the event Congress failed to agree with such interpretations an amendment would be appropriate. However, a few days following, H. R. 5386 was introduced in the House of Representatives for the purpose of amending Section 8 (b), directly involved in this case, which increased the veteran's rights under the section by extending the time during which he is required to apply for reinstatement from forty (40) to ninety (90) days. This amendment was later enacted into the statute on December 8, 1944. (Pub. Law 473, 78 Cong.) We submit that the re-enactment of the statute under such conditions, without changing the interpretation which had been adopted by the Director, was ample evidence of Congressional acquiescence. (*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Insurance Co. v. U. S.*, 288 U. S. 269, 273; and *National Lead Co. v. U. S.*, 252 U. S. 140, 146.)

It does not appear probable that on such a vital issue Congress would permit the Director of Selective Service to convey a false impression to the many veterans who had been apprised of the Director's Memorandum and who presumably were depending on it upon return to civilian life. After the issuance of Local Board Memorandum No. 190-A, Congress adopted:

> "1. Servicemen's Readjustment Act of 1944 (Public Law 346, 78th Congress; Act of June 22,

1944, 58 Stat. 293, 38 U. S. C. A. Sec. 695) creating Veterans Placement Service Board composed of the Administrator of Veterans Affairs as Chairman, the Director of Selective Service, and the Federal Security Administrator.

"2. Veterans Preference Act of 1944 (Public Law 359, 78th Congress; Act of June 27, 1944, 58 Stat. 387) affecting Section 8 (b) (A) of the Selective Service Act by conferring certain preferences on veterans.

"3. Act of October 3, 1944 (58 Stat. 788, 50 U. S. C. A. App. 1663) establishing the Retraining and Re-employment Administration to have general jurisdiction over veterans' matters."

Section 600 of Title IV of the Servicemen's Readjustment Act, commonly referred to as the "G. I. Bill of Rights", provided.

"(a) In the enactment of the provisions of this title Congress declares as its intent and purpose that there shall be an effective job counseling and employment placement service for veterans, and that, to this end, policies shall be promulgated and administered, so as to provide for them the maximum of job opportunity in the field of gainful employment * * *."

The employment of the word "maximum" in this section indicated a Congressional intent to give job preference to veterans. General Lewis B. Hershey, Director of Selective Service, issued a statement as follows:

"The policy follows long established historical precedents of our Government. It has been a factor in the efficiency of our armed forces because it has made our fighting men believe that their Government

> would not forget their contribution in keeping war from the American homeland and in saving the world."

This is indeed a sound announcement.

Much stress has been placed upon certain decisions by the National Labor Relations Board adopting an opposite view. (*In re Scoville Mfg. Co.*, 21 W. L. R. 200; *In re Arbitration* between *Timkin Roller-Bearing Co.* and *U. S. Steel Workers of America, etc.*, 16 L. R. R. 158-167; *Firestone Tire & Rubber Company & United Rubber Workers of America, etc.*, 17 L. R. R. 77-99. (But see dissenting opinion of Frederic R. Twelvetrees *In the Matter of the Arbitration between Bell Aircraft Corporation, etc., & United Automobile, Aircraft and Agricultural Implement Workers of America, etc. et al.*, Feb. 20, 1946.)

It is apparent that these decisions did not take into consideration the fact that the rights created in favor of the veteran were independent and additional rights not to be impaired by collective bargaining agreements, nor did they consider the suspension of the rights under collective bargaining agreements in conflict with the rights of the veteran. We believe the soundness of the reasoning in the case of *Whirls v. The Trailmobile Company, supra,* completely answers the reasoning upon which the Labor Board's decisions were predicated. Inasmuch as the question must ultimately be decided by the courts, the conclusions announced in this case cannot be lightly disregarded.

The Attorney General of the United States, under whose direction the various District Attorneys have conducted litigation for the protection of the veteran under Section 8, is in full agreement with the Director's views. Consequently we believe that the Director's "rulings, interpretations, and

opinions" • • • "While not controlling upon the courts" • • • "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore et al v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161.

1. The Majority Opinion in the Court Below Is Inconsistent with the Uniform Application of the Act.

The restricted construction of Sections 8 (b) and (c) of the Act adopted by the majority opinion in the court below is inconsistent with the intent of Congress, as we have heretofore pointed out in this brief. If applied literally, it would emasculate any substantive rights which Congress intended to create. The opinion did not recognize that the right accorded to the veteran is an independent right protected by statute, not to be impaired by collective bargaining agreements. The dissenting opinion is in accord with a liberal construction of this legislation, which must be adopted if any meaning beneficial to the veteran is to result. If the majority opinion is followed, no uniformity of application would apply.

Judge Chase in his dissent points this out as follows:

> "And finally Congress passed this statute for the benefit alike of all honorably discharged veterans who had been taken from employment more stable than what is called temporary. There is no discernable purpose not to treat them all the same and no good reason why Congress should not have intended to make a man who was inducted from a closed shop as secure in his job during the first year after his return as a man inducted from an open shop would be. One as much as the other would need this ad-

justment period before facing the full brunt of competition for his job. I think Congress has by word and act well demonstrated its purpose to provide for equality of treatment in this respect regardless of private contracts made by any employer with anybody."

It has been said that to adopt the viewpoint advocated in this brief would result in giving the veteran some one else's job rather than the one he left. (See *Olin Industries v. Barnett et al. U. S. District Court*, S. D. S. D. Illinois, Civil No. 618, January 24, 1946.) However, such a statement presupposes that the employee attaches to the job. This is not an incident of employment unless accorded by statute or contract. (*Elder v. New York Central R. R. Co.*, 152 Fed. (2nd) 361-64.) The non-veteran, in the instant case, could only assert the right to the job over the veteran or the theory that the collective bargaining agreement protected him in this alleged right. Yet the veteran's right is statutory and the non-veteran's right is suspended by the same statute. Consequently the Act does not give the veteran the non-veteran's job, but reinstates him to the job which he left to enter the military service.

V.

Relative Equities Involved.

Those who have opposed the veteran's right to be restored to his former position for a period of one year after return from his military service have predicted dire consequences to industry and labor if our contentions as to the construction of the statute are adopted by the court. They have asserted that it would unnecessarily slow up the processes of reconversion which are so vitally needed throughout the nation at this time. It is apparent, however, that

most employers are recognizing the right of the veteran to re-employment under Section 8 of the Act as in March, 1946, General Lewis B. Hershey, Selective Service Director, after pointing out that more than ten million men and women had been discharged as of March, 1946, and that several hundred thousand have been given assistance by the Selective Service System, further stated:

> "It is significant, when considered in the light of these huge numbers discharged, that only 17 cases have actually gone to trial and that less than 400 cases are pending in the Federal courts or awaiting action in the hands of United States attorneys." (See Selective Service Magazine, Vol. VI, No. 3, March, 1946.)

We readily admit that the problem of reconversion of business to a peace time basis and the rehabilitation of the veteran are the greatest problems confronting our nation today, perhaps greater than any battle fought during the entire war. We deny, however, that in its solution the rehabilitation of the veteran should be subservient to the reconversion of industry. We believe that both should go hand in hand and the problem should be solved by the realization that the great struggle which we have won has created situations which will prevent the normal functioning of human and business relations for an indeterminate period in the future. Every citizen in the past few months has been confronted with this undeniable fact. Consequently both management and labor must realize, now that the war is over and the veteran has performed his part of the obligation, they cannot follow the even tenor of their ways and give no consideration to his rights. Any other viewpoint would not be in keeping with "long established historical precedents of our Government" and our people. We have never forgotten in times past the

contribution which the veteran has made in protecting the American homeland from invasion. To change such policy now would be to deny the veteran, after he has performed his obligations under the Act, the benefits which were assured him by its terms.

CONCLUSION

We are of the firm opinion that Congress in the enactment of this legislation had in mind a long-range program, which not only included the training of an army and navy for the protection of the nation, but also for the rehabilitation of the veteran who served so that he could quickly return to his civilian pursuits and re-establish himself as a citizen. If that is not the meaning of the Act, then it would appear that the purpose to be accomplished would result in little or no value. However, the whole course of this legislation evidences a purpose and intent on the part of Congress to grant a right, born of service, which would be of the greatest benefit to the veteran upon his return.

We, therefore, respectfully submit that for the reasons herein enumerated the judgment of the majority of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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APPENDIX A

The Selective Training and Service Act of 1940, as Amended

Section 1. Declaration of Policy and Intent of Congress.

Be enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and service, * * *

Sec. 8: Certificates * * *; Re-employment * * *; Replacement in Industry.

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any

employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *

* At time plaintiff applied for re-employment, this read forty days.

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States District attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act. * * *

Sec. 10. Rules and Regulations; Selective Service System.

(a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) To create and establish a Selective Service System • • •

(3) To appoint, by and with the advice and consent of the Senate • • • a Director of Selective Service • • •.

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except Section 9) • • •.

Sec. 16. Suspension of Conflicting Laws; Duration of Act; • • •.

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of Sections • • • 8 (g) • • • shall become inoperative and cease to apply on and after May 15, 1946 • • •.

SUPREME COURT OF THE UNITED STATES.

No. 970.—October Term, 1945.

Abraham Fishgold, Petitioner, *vs.* Sullivan Drydock & Repair Corporation, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 27, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is an employee of the Sullivan Drydock & Repair Corporation. He entered its employ in 1942 and worked for it at a shipyard until he was inducted into the Army in 1943. He served in the Army a little over a year and was honorably discharged and received a certificate to that effect. He had worked for the corporation as a welder and after his tour of duty in the Army ended, he was still qualified to perform the duties of a welder. Within forty days of his discharge, he applied to the corporation, as was his right under the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 301, for restoration to his former position.[1] He was reemployed as a welder on August 25, 1944.

[1] The Act provides in part:

"Sec. 8(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position

The Corporation and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America had a collective bargaining agreement which provided:[2]

> "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

As work at the shipyard decreased, men would be laid off. The men selected by the foremen, on the basis of ability and seniority to be laid off would report to a department head for reassignment on the basis of their relative seniority when work became available. On each of nine days in the spring of 1945 petitioner was laid off although other welders, not veterans of the recent war, possessing the same or similar skill as petitioner, were given work on those days. These men were preferred because they had a higher shop seniority than petitioner. The decision to lay off petitioner followed a decision of an arbitrator who ruled that the seniority provisions of the collective bargaining agreement, which we have quoted, required it and that they were not inconsistent with the provisions of the Selective Training and Service Act of 1940.

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of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . . ."

The forty day period has been extended to ninety days. Section 8 (b) as amended in 1944, 58 Stat. 798, gives the veteran a right to be reemployed if he makes application "within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

[2] The agreement provided:

"Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed."

Thereupon petitioner brought this suit, pursuant to § 8(c) of the Act,[3] to obtain a declaratory judgment as to his rights under the Act and to obtain compensation for the days he was not allowed to work. The corporation answered, justifying its action by the provisions of the collective bargaining agreement and the decision of the arbitrator. The union was permitted to intervene.[4] It alleged in its answer that the action of the corporation was warranted by the provisions of the collective bargaining agreement and was not in violation of the Act. The District Court refused the declaratory judgment requested, but entered a money judgment for petitioner for the loss of wages during the nine days in question. 62 F. Supp. 25. It held that petitioner was laid off in violation of the Act. It was also of the view that the collective bargaining agreement was not inconsistent with the Act. Only the union appealed. The Circuit Court of Appeals reversed, one judge dissenting. — F. 2d —. It held that the Act did not give petitioner the preference which he claimed and that the terms of the collective bargaining agreement justified the corporation's action. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

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[3] Section 8(c) provides:

"In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney (or comparable official) for the district in which such private employer maintains a place of business, the person claiming to be entitled to the benefits of such provisions, the United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim and in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits."

The United States appeared as *amicus curiae* in the Circuit Court of Appeals. It appears in this Court as representative of petitioner by reason of the provisions of § 8(c).

[4] Permissive intervention is governed by Rule 24(b) of the Rules of Civil Procedure which allows it on timely application "when an applicant's claim or defense and the main action have a question of law or fact in common."

I. We are met at the outset with the claim that the union had no appealable interest in the judgment entered by the District Court and accordingly that the Circuit Court of Appeals lacked jurisdiction to entertain it. It is pointed out that a money judgment was entered only against the corporation and that no relief was granted against the union. It is therefore argued that the judgment did not affect any substantive right of the union and that at most the union had merely an interest in the outcome of litigation which might establish a precedent adverse to it. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632. It is also pointed out that the statutory guarantee against discharge without cause for one year[5] had expired at the time of the District Court's judgment, that therefore no declaratory relief was granted, and that petitioner's rights for the future were not adjudicated. It is contended that the dispute between petitioner and the union has thus become moot.

But that argument misses the point. The answer of the corporation and the union put in issue the question whether there was a conflict between the collective bargaining agreement and the Act and if so, which one prevailed. The parties to the collective bargaining agreement—the union and the corporation—were before the court. A decision on the merits of petitioner's claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated, with the union as a party. Hence if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met

[5] Section 8(c) of the Act provides:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

Paragraphs A and B of subsection (b) of § 8 are set forth in note 1, *supra*.

with the plea of *res judicata*. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit. This elementary principle has long been recognized. Black, The Law of Judgments (2d ed.) pp. 764, 821, 936. As stated in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, a prior judgment "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And see *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 479; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage Dept.* v. *Baxter State Bank*, 308 U. S. 371, 375, 378. The case of *Boston Tow Boat Co.* v. *United States*, *supra*, would be relevant if the collective bargaining agreement in issue was one between different parties.[6] Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its "independent right to relief" would not be increased by reason of its intervention in the cause. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (*Alexander Sprunt & Son* v. *United States*, *supra*, p. 255) was adjudicated.[7]

It is suggested, however, that the result of what we do is to free the union and the employer from costs and burden Fishgold

[6] In that case Boston Tow Boat Co. intervened in a proceeding before the Interstate Commerce Commission involving the status of another carrier. It sought to appeal from the adverse decision against the other carrier. That right was denied. The order in question was not determinative of the status of Boston Tow Boat Co. That question was involved in another order of the Commission from which Boston Tow Boat Co. had an appeal pending.

[7] The case is therefore closely analogous to one where the interest of an intervenor in property involved in the litigation was adjudicated. Dexter Horton Nat. Bk. v. Hawkins, 190 Fed. 924; United States v. Northwestern Development Co., 203 Fed. 960.

with them. There are several answers to that. The allowance of costs has no bearing on what is or what is not *res judicata*. Their allowance to the prevailing party is not, moreover, a rigid rule. Under the Rules of Civil Procedure the court can direct otherwise. Rule 54(d). And finally, Congress has provided in § 8(e) of this Act that when a veteran applies to the District Court for the benefits of the Act "no fees or court costs shall be taxed" against him.

II. We turn then to the merits. The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

These guarantees are contained in § 8 of the Act[8] and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment.[9] § 8(b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position "or to a position of like seniority, status, and pay." § 8(b) (A) (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (3) He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. § 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. (4) He "shall not be discharged from such position without cause within one year after such restoration." § 8(c).

Petitioner's case comes down to the meaning of this guarantee against "discharge". "Discharge" is construed by him to include

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[8] Section 8(b) is set forth in note 1, *supra*, and § 8(e) in note 5, *supra*.

[9] As we have noted, the original forty day period has been extended to ninety days. See note 1, *supra*.

"lay-off". And it is earnestly argued that Congress could not have intended to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if it was available.

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner*, 319 U. S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

We can find no support for petitioner's position in the provision of § 8(b) which restores him to his former position or to a "position of like seniority". Nor can we find it in § 8(c) which directs that he "shall be so restored without loss of seniority". As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.

Nor can we read into the guarantee against discharge "from such position" a gain or step-up in seniority. That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. The guarantee against discharge "from such position" is broad enough to cover demotions. The veteran is entitled to be restored to his old position or to a "position of like seniority, status, and pay." If within the statutory period, he is demoted, his status which the Act was designed to protect, has been affected and the old employ-

ment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of § 8(c) be "discharged from such position." But the guarantee against discharge does not on its face suggest the grant of a preference to the veteran over and above that which was accorded by the seniority of "such position".

Discharge normally means termination of the employment relationship or loss of a position.[10] In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been "discharged".[11] There are three terms used in § 8(c) which relate to various types of cessation of work—a "furlough", a "leave of absence" and a discharge. A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8(c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions.[12] Thus when Congress desired to cover the contingency of a lay-off, it used apt words to describe it. If it had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation.

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[10] "Release or dismissal from an office, employment, etc., as, the *discharge* of a workman." Webster's New International Dictionary (2d ed.)

"To relieve of a charge or office; (more usually) to dismiss from office, service, or employment; to cashier." Oxford English Dictionary.

[11] Temporary suspension of an employee's work commonly does not affect the continuance of his status. See National Labor Relations Board v. Waterman S. S. Co., 309 U. S. 206; North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 109 F. 2d 76, 82.

"Lay-off" is defined as "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season." Oxford English Dictionary, Supp.

[12] See Union Agreement Provisions, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess., chs. 8, 14.

The "position" to which the veteran is restored is the "position" which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his "position" when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old "position" or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's "circumstances have so changed as to make it impossible or unreasonable" to restore him. § 8(b)-(B). He is entitled to be recalled to work in accordance with his seniority. His "position" exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the "position" in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.

The construction which we have given "discharged" does not rob that guarantee of vitality. As the Circuit Court of Appeals observed, where there is a closed shop agreement the union would normally afford its members protection against termination of their employment status without cause. But in many situations the guarantee against dismissal without cause for one year is of great practical importance and is a protection granted veterans only.

Our construction of the Act finds support in its legislative history. Representative May had charge of the bill on the floor of the House. He explained an amendment to § 8(c), which added the words "shall be considered during the period of service in such forces as on furlough or leave of absence" and also elaborated the clause dealing with "insurance or other benefits". He said:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." 86 Cong. Rec. 11702.

And before that amendment the committee Report of the Senate stated:

> "The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life." S. Rep. No. 2002, 76th Cong., 3d Sess., p. 8.

We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none then available for him.

It is said, however, that when Congress amended § 8 of the Act in 1944[13] (58 Stat. 798) and extended the Act in 1945 without any change in § 8 (Pub. L. 54, 79th Cong., 1st Sess.), it was apprised of an administrative interpretation of § 8(c) that a veteran was entitled to his former job regardless of seniority; and that therefore Congressional approval of or acquiescence in the administrative construction would be inferred. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273, and cases cited. An administrative interpretation was rendered by the Director of Selective Service who was authorized to administer the Act.[14] He had ruled that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority."[15] But a different construction was given to § 8(c) by the National War Labor Board in its handling of disputes arising out of the negotiation of collective bargaining agreements.[16] The Board read the Act as we read it.

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[13] See note 1, *supra*.

[14] Executive Order 8545, September 23, 1940, 5 Fed. Reg. 3779.

[15] Local Board Memorandum 190-A, May 20, 1944, Part IV, § 1(C).

[16] See Scoville Mfg. Co., 21 War Labor Rep. 200, 201, 202.

The ruling of the Director may be resorted to for guidance. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. —. But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions. *Skidmore* v. *Swift & Co.*, *supra*, p. 139. The history and language of the Act would need be far less clear for us to give his rulings persuasive weight. Moreover, as the Circuit Court of Appeals pointed out, the contrariety of administrative rulings[17] lends less credence to the contention that Congress by the amendment in 1944 and the extension in 1945 showed a preference for one over the other. In view of the language of the Act and the nature of the administrative findings we would want explicit indication by Congress that it chose the Director's interpretation before we concluded that Congress had adopted it.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[17] See Note 54 Yale L. Journ. 417.

Mr. Justice BLACK dissenting.

I believe we should reverse the judgment of the Circuit Court of Appeals and remand the cause to it with directions to dismiss the appeal for want of jurisdiction because the Union was not a proper party to appeal. The money judgment was in favor of Fishgold and against the Sullivan Dry Dock and Repair Company. Had the Company paid the judgment I see no way in which the Union would have been "aggrieved." The only reason advanced by the Court for holding that the Union was "aggrieved," is that, had the District Court judgment remained on the books, the judicially formulated doctrine of *res adjudicata* would have barred the Union in any future proceedings from challenging the District Court's application of the federal statute to the particular collective bargaining agreement. A fair application of *res judicata* bars a party in a second litigation only if that proceeding involves the same issues as the first litigation be-

tween the same adverse parties or privies. This means that *res judicata* could bar the Union only in a new proceeding between it and Fishgold or his privies. But there is no possibility of such litigation since the seniority right which the District Court held Fishgold had under the statute had under its provisions expired by the time the Union appealed. *Res judicata* would not have barred the Union in a proceeding between it and any other party since no other party was a party adverse to the Union in the present suit. And this includes any possible proceeding between the Union and the Sullivan Dry Dock Company since that Company, though a party, was not an adverse party in the trial court. None of the cases cited by the Court's opinion support the proposition that a party is bound in a future litigation against a party that was not an adverse party, but on the same side, in the earlier litigation. Nor do these cases or any other decision of this Court of which I am aware formulate as the rule of this Court the harsh doctrine of collateral estoppel, adopted in a few state jurisdictions, which always bars a losing party, so long as the issue is the same, even though the later litigation involves different adverse parties. It is unlikely that this harsh doctrine, never adopted by this Court, would in the future have been applied to bar the Union in any further proceedings involving interpretation of the scope of its collective bargaining agreement in the light of the federal statute. In my opinion the Union would not have been barred by the trial court's judgment. It was therefore not an aggrieved party and not entitled to appeal.

The result of permitting parties not adversely affected to appeal a judgment is to impose burdens upon litigants actually interested when those litigants may themselves be fully satisfied with the judgment. The scope of *res judicata* should not be extended to produce such a result. This case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents. *Boston Towboat Company* v. *United States*, 321 U. S. 632.